No. 83-6392

In the Supreme Court of the United States

October Term, 1983

JAMES LOUDERMILL,
Petitioner,

vs.

THE CLEVELAND BOARD OF EDUCATION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS THE CLEVELAND CIVIL SERVICE COMMISSION AND THE CITY OF CLEVELAND

JOHN D. MADDOX
Director of Law
STUART A. FRIEDMAN
Assistant Director of Law
Counsel of Record
Room 106 - City Hall
601 Lakeside Avenue
Cleveland, Ohio 44114
(216) 664-2680
Attorneys for Respondents The Cleveland Civil Service Commission and The City of Cleveland

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5617

QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment compels a final, unappealed judgment within nine months of initiation of an administrative appeal by a school board security guard discharged for dishonesty?

2. Whether a discharged school board security guard can collaterally challenge an unappealed administrative agency adjudication of dishonesty by a complaint which fails to allege publication of false information?

PARTIES

The Plaintiff-Appellant in the Court of Appeals was James Loudermill. The Defendants-Appellees in the Court of Appeals were the Cleveland Board of Education (John Gallagher, President), the City of Cleveland (George V. Voinovich, Mayor), the Cleveland Civil Service Commission (Thomas R. Skulina, President), and William J. Brown (Attorney General of the State of Ohio). The Attorney General was named in the complaint; but, none of the allegations pertained to the State of Ohio, no relief was sought against the State of Ohio, and the State of Ohio did not participate in the proceedings before the Court of Appeals. In this brief, Petitioner James Loudermill is referred to as "Loudermill." Since Respondent City of Cleveland appears in this case only because Respondent the Cleveland Civil Service Commission is alleged to be an agency of the City, these Respondents are jointly referred to as "the Commission."

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OPINIONS BELOW

The decision and opinion of the United States Court of Appeals for the Sixth Circuit, entered on November 17, 1983, is reported at 721 F.2d 551 and appears in the Petition Appendix, pp. A1-33 (Case No. 83-1362). The November 6, 1981, Memorandum and Order of the United States District Court for the Northern District of Ohio, and that Court's February 22, 1982 Memorandum and Order denying Petitioner's Motion to Alter or Amend Judgment, neither of which are officially reported, both appear in the Petition Appendix, pp. A34-49 and A50-62, respectively.[1]

1. In this Brief, the Petition Appendix (Case No. 83-1362) is cited as "Pet. App. p. .....", the Joint Appendix (Case Nos. 83-1362, 83-1363 & 83-6392) is cited as "Joint App. p. .....", and the attached Appendix to Respondents' Brief (Case No. 83-6392) is cited as "App. p. ....."

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1). The judgment of the Court of Appeals was entered on November 17, 1983 (Pet. App. pp. A1-33). A timely Petition for a Writ of Certiorari was granted by the Court on May 21, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the Constitution states, in pertinent part, as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law....

2. Ohio Revised Code §124.34, the statute at issue in this case, states in pertinent part as follows:

> Tenure of office; reduction, suspension, and removal; appeal
>
> The tenure of every officer or employee in the classified service of the state and the counties, civil service townships, cities, city health districts, general health districts, and city school districts thereof, holding a position under this chapter of the Revised Code, shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except as provided in Section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness,

immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections, or the rules of the director of administrative services, or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office. A finding by the appropriate ethics commission, based upon a preponderance of the evidence, that the facts alleged in a complaint under Section 102.06 of the Revised Code constitute a violation of Chapter 102 of the Revised Code may constitute grounds for dismissal. Failure to file a statement or falsely filing a statement required by Section 102.02 of the Revised Code may also constitute grounds for dismissal.

In any case of reduction, suspension of more than three working days, or removal, the appointing authority shall furnish such employee with a copy of the order of reduction, suspension, or removal, which order shall state the reasons therefor. Such order shall be filed with the director of administrative services and state personnel board of review, or the commission, as may be appropriate.

Within ten days following the filing of such order, the employee may file an appeal, in writing, with the state personnel board of review or the commission. In the event such an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the board or commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority.

In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officer or employee may appeal from the decision

of the state personnel board of review or the commission to the court of common pleas of the county in which the employee resides in accordance with the procedure provided by section 119.12 of the Revised Code.

3. One section of the Ohio Revised Code and several rules of the Cleveland Civil Service Commission are cited as relevant background information and reprinted in the attached Appendix to this brief. These provisions are: R.C. §2739.02 Defenses in actions for libel and slander; Rule 9.40 Hearing before the Referee; Rule 9.41 Postponement of [*sic*] Continuance of Hearing; Rule 9.60 Appeal To The Commission; and Rule 9.70 Rules of Procedure for Appeal Hearing. Although rules are cited to the Revised Edition, November 1, 1982, the above rules were in effect during Loudermill's hearings before the Commission.

STATEMENT OF THE CASE

On October 27, 1981, Loudermill lodged a 42 U.S.C. §1983 Complaint in the United States District Court for the Northern District of Ohio. As to defendant Commission, he claimed that he was denied a "speedy resolution" of his statutory appeal of his discharge for dishonesty from his job as a security guard for the Cleveland Board of Education ("the Board"). He further claimed that this lack of a "speedy resolution" denied him due process under the Fourteenth Amendment to the United States Constitution.

Loudermill's complaint allegations (Joint App. pp. 6-12) included:[2]

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2. Since the District Court dismissed this case *sua sponte* based on the complaint allegations, those allegations have been and should be accepted as true for purposes of appellate review.

14. On September 25, 1979 the plaintiff filled out an application for a non-teaching position as a security guard with said defendant [the Board].

15. The plaintiff stated in said application that he had never been convicted of a felony and he was hired as a security guard with the Business Department of the Defendant Cleveland Board of Education . . . .

• • • • •

17. A record check was conducted on all employees in said department in October, 1980 which revealed that the plaintiff was convicted of grand larceny in 1968.

18. On November 3, 1980, George Mazzaro, Business Manager for the Defendant Cleveland Board of Education sent a letter to the plaintiff advising him that he was being removed from his employment for dishonesty.

• • • • •

20. The plaintiff filed a Notice of Appeal of his removal with the defendant Cleveland Civil Service Commission on November 12, 1980. A hearing before a referee of said defendant was originally scheduled for January 22, 1981 but was continued until January 29, 1981 when a hearing was actually held.

21. The referee filed and served his recommendations on or about April 1, 1981. A hearing was held before the full civil service commission on July 20, 1981 which announced its decision that it would affirm the plaintiff's removal.

22. The defendant Cleveland Civil Service Commission approved a proposed findings of fact and conclusions of law on August 10, 1981 and advised plain-

tiff's attorneys of said fact by letter dated August 21, 1981.

Finding no basis for the claimed denial of due process under these allegations and applicable law, the District Court *sua sponte* dismissed the Complaint on November 6, 1981 (Pet. App. pp. A34-49).

Loudermill then joined with Richard Donnelly, Respondent in companion case No. 83-1363, and filed a joint Motion to Alter or Amend Judgments, which was denied by the District Court on February 22, 1982 (Pet. App. pp. A50-62).

Loudermill appealed to the United States Court of Appeals for the Sixth Circuit which on November 17, 1983, reversed the decisions of the District Court as to the Board, but *affirmed* the decisions of the District Court as to the Commission (Pet. App. pp. A1-33; A63-64).

On May 21, 1984 this Court granted the Petitions for Writ of Certiorari of Petitioner Board and Cross-Petitioner Loudermill.

SUMMARY OF ARGUMENT

Since Loudermill and the Board both had a right to appeal the Commission's adjudication through four levels of state and federal courts, the Commission lacked the power to compel any resolution, much less a "speedy resolution" of Loudermill's claim.

Loudermill's two hearings, over approximately nine months, encompassed the full panoply of due process rights and did not offend the United States Constitution. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Arnett v. Kennedy*, 416 U.S. 134, *reh'g denied*, 417 U.S. 977 (1974); Civil

Service Commission Rules, 9.40-9.41, 9.60-9.70 (Rev. ed. November 1, 1982) (App. pp. A1-4).

Loudermill did not plead that the Commission published false statements about his dishonesty, and the Commission's unappealed adjudication of his dishonesty conclusively bars this collateral attack on its determination. *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966).

ARGUMENT

I. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT ELEVATE TO A CONSTITUTIONAL MANDATE LOUDERMILL'S PREFERENCE FOR "SPEEDY RESOLUTION" OF LITIGATION HE INITIATED.

Loudermill is suing the "judge" (the Commission) in another proceeding he initiated because the Commission's ruling was not "speedy" enough to please him. Apparently he was not sufficiently displeased with the Commission's adjudication of his dishonesty to exercise his statutory right to appeal that decision to the Court of Common Pleas (state trial court). R.C. §124.34. Instead, he filed this collateral action to voice his displeasure.

The only reason there was a "resolution" as early as nine months after he filed his administrative appeal was that he elected to forego his appellate rights.[3] The Com-

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3. Following the Commission's adjudication, Loudermill could have appealed to the Court of Common Pleas, R.C. §124.34, and following a proceeding in that Court either the Board or Loudermill could have appealed to the State Court of Appeals and subsequently sought review in the Ohio Supreme Court and this Court. *See, State, ex rel. Henderson v. Civil Service Commission*, 63 Ohio St. 2d 39, 41, 406 N.E.2d 1105, 1106 (1980).

mission's adjudication thereby became a final, unappealed factual determination of Loudermill's dishonesty.

Loudermill's due process rights did not include the Board relinquishing its right to appeal through four more levels of Court review prior to final "resolution" of his administrative appeal. Therefore, he had no constitutional right to a "speedy resolution" in his favor in less than nine months.[4]

Both courts below, in entering judgment for the Commission, agreed that analysis of Loudermill's due process attack on the Commission must be more than an academic exercise. It must be an analysis that considers limited resources and burgeoning dockets in the real world.

Citing *Arnett v. Kennedy*, 416 U.S. 134, *reh'g denied*, 417 U.S. 977 (1974), and *Board of Regents v. Roth*, 408 U.S. 564 (1972), the District Court held:

> Since this court is well aware of the congested nature of the dockets of administrative agencies such as the Cleveland Civil Service Commission, the court holds that the delay which occurred in processing Loudermill's appeal in the instant case did not constitute a violation of his procedural due process rights. (Pet. App. pp. A41-42.)

Similarly, the Court of Appeals noted "the Commission's delay in Loudermill's situation probably stemmed from administrative backlog . . ." (Pet. App. p. A29 n.19). Citing *Arnett* and *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court of Appeals held:

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4. No authority is necessary to support the proposition that it is almost impossible to "resolve" a dispute in a single court or administrative agency within nine months much less proceed through an agency and four courts in less than nine months.

> While we do not condone the delays in the two cases [*Donnelly* and *Loudermill*] before us, we hold that neither delay violated due process. (Pet. App. p. A30.)

As this Court well knows, dockets of administrative agencies and courts have increased substantially since *Arnett* and *Mathews* were decided.

Since the Commission cannot deprive any party, Loudermill or the Board, of its right to appeal, the Commission was as a matter of law incapable of mandating any "resolution," much less a "speedy resolution," of Loudermill's claim.

This Court should affirm the judgments of both courts below that the procedures of the Commission did not deny Loudermill due process.

II. LOUDERMILL FAILED TO PLEAD THAT ANY FALSE STATEMENTS ABOUT HIM WERE PUBLISHED BY THE COMMISSION, AND ITS UNAPPEALED ADJUDICATION OF HIS DISHONESTY CANNOT BE COLLATERALLY CHALLENGED IN THIS CASE.

A. Loudermill Failed to Plead That the Commission Published False Statements About Him.

The complaint is totally devoid of allegations that the Commission published false statements about Loudermill (Joint App. pp. 6-12).

This reading of the complaint was confirmed by the district court (Pet. App. p. A58):

> [S]ince it is necessary for the purpose of establishing entitlement to due process protection of a "liberty" interest in his reputation for a plaintiff to provide that "in the course of terminating his employment, the

> agency prepared a report . . . which was (a) false, (b) stigmatizing, and (c) published," *Hufsttutler* [sic] *v. Bergland*, 607 F.2d 1090, 1092 (5th Cir. 1979), (footnotes omitted); *Paul v. David*, 424 U.S. 693, 96 S. Ct. 1155 (1976); *Codd v. Velger*, 429 U.S. 624, 97 S. Ct. 882 (1977); *Board of Regents v. Roth*, *supra*; *Bishop v. Wood*, 426, U.S. 341, 96 S. Ct. 1074 (1976), and neither Loudermill, nor Donnelly, alleged either falsity or publication, their claims that they were deprived of their protected "liberty" interests in their reputations are facially meritless.

This reading of the complaint was also confirmed by the Court of Appeals (Pet. App. p. A27 n.18):

> [W]hile the discharge of Loudermill might be considered stigmatizing, he failed to allege that the reasons for his dismissal were "published", a prerequisite to any liberty interest claim. *Huffstutler v. Bergland*, 607 F.2d 1090, 1092 (5th Cir. 1979). Accordingly, we affirm the district court's dismissal of those parts of the complaints which it construed as raising a Fourteenth Amendment liberty interest.

Clearly, Loudermill cannot foist liability on the Commission by invoking the Commission's adjudicatory power to determine his dishonesty, and then base a damage claim on the exercise of that power. The absolute immunity from damage claims applicable to judicial proceedings and orders, *Dennis v. Sparks*, 449 U.S. 24 (1980) (invalid injunction order in civil suit); *Stump v. Sparkman*, 435 U.S. 349, *reh'g denied*, 436 U.S. 951 (1978) (*ex parte* sterilization order), extends to administrative adjudications by the Commission. *See, Butz v. Economou*, 438 U.S. 478, 514 (1978) (federal agency officials performing adjudicatory functions are absolutely immune).

This Court should affirm the determination of the courts below that Loudermill cannot assert a claim totally foreign to his complaint.

B. The Truth of the Commission's Unappealed Adjudication of Loudermill's Dishonesty May Not Be Challenged in This Collateral Proceeding.

Loudermill's reference to "defamatory statements" (Loudermill brief at 27) ignores that truth is a "complete defense" to a claim of defamation under Ohio law. R.C. 2739.02 (App. p. A1).

He alleges that he was "removed from his employment for dishonesty." (Joint App. p. 9). He also alleges that, following hearings before a referee and the full Commission,[5] the Commission "announced its decision that it would affirm the plaintiff's removal." (Joint App. p. 10).

Loudermill did not challenge by appeal this adjudication of his dishonesty. Therefore, the fact of his dishonesty has been conclusively determined. As the Court of Appeals said (Pet. App. A18 n.12):

> The facts adjudicated at the administrative hearing do have collateral estoppel effect. *See generally United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966); *see also* Restatement (Second) of Judgments §83(s) comment b (1982).

In *Utah Construction & Mining Co.*, 384 U.S. *supra* at 422, this Court held conclusive the factual determination of the federal Board of Contract Appeals, stating:

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5. Under Rules of the Civil Service Commission Rules, Rules 9.40-9.41, 9.60-9.70 (Rev. ed. November 1, 1982) (App. pp. A1-4), Loudermill enjoyed comprehensive due process protection in the adjudication of his dishonesty.

When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.

This Court should confirm that, having adjudicated the fact of Loudermill's dishonesty, the Commission may not now be subject to liability for "defamatory statements" concerning his dishonesty.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals, which affirmed the judgment of the District Court as to Defendant Cross-Respondents Cleveland Civil Service Commission and City of Cleveland, Ohio, should be affirmed.

Respectfully submitted,

JOHN D. MADDOX
Director of Law
STUART A. FRIEDMAN
Assistant Director of Law
Counsel of Record
Room 106 - City Hall
601 Lakeside Avenue
Cleveland, Ohio 44114
(216) 664-2680
Attorneys for Respondents
The Cleveland Civil Service Commission and The City of Cleveland

APPENDIX

OHIO REVISED CODE

2739.02 Defenses in actions for libel or slander

In an action for a libel or a slander, the defendant may allege and prove the truth of the matter charged as defamatory. Proof of the truth thereof shall be a complete defense. In all such actions any mitigating circumstances may be proved to reduce damages.

CIVIL SERVICE COMMISSION RULES

9.40 Hearing Before the Referee. At the hearing before the Referee, Civil Service Commission, the discharged, suspended or reduced officer or employee shall be heard in person and may be represented by counsel in his own defense and may support the same by testimony of witnesses. At the conclusion of such hearing, or within five (5) work days, the Referee shall submit findings of fact, conclusions of law and recommendations to the Director in the City Service. Upon review of the facts, conclusions and recommendations by the Referee, the Director may sustain, modify or overrule the action of the appointing authority in the city service in discharging, suspending, or reducing the officer or employee concerned.

In any event, within five (5) work days from the date he receives the facts, conclusions and recommendations from the Referee, the Director shall forward his written decision to the Commission and to the officer or employee.

In the event the discharged, suspended or reduced officer or employee was at the time of separation from

service, under indictment for a felony or charged with a misdemeanor involving moral turpitude, either the appointing authority or the said officer or employee shall be granted a postponement of the hearing required by these rules, until after the aforementioned alleged violation of law has been adjudicated, by timely filing a request with the hearing officer.

9.41 Postponement of Continuance of Hearing. The referee may postpone or continue any hearing provided for in Rule 9.40 upon the request of any party or upon the referee's own motion, for good cause shown, but no postponement or continuance shall be granted for a period longer than ten (10) days. Further continuances shall not be granted unless either party makes such request, in writing, to the referee at least three (3) days prior to the scheduled hearing date, setting forth the reasons therefor, and the referee shall have sole discretion whether to grant or refuse such request and shall notify the parties accordingly. No continuance shall be granted for a period longer than ten (10) days.

The granting of a continuance to either party, as herein provided, shall not operate, in any manner, to prejudice the rights of either party to the proceedings.

9.60 Appeal To The Commission. Appeal to the Commission from the decision of the director in all cases provided for by the Charter, shall be deemed perfected when the officer or employee concerned shall file notice thereof in writing with the Commission within ten (10) days after such decision. The Commission shall be notified of such notices of appeal in the routine matters of the agenda.

Within seven (7) days after filing a notice of appeal from the decision of the Director, any party wishing to

introduce additional evidence shall notify the Commission in writing, including a list of witnesses and exhibits and an indication of the approximate length of time the presentation of such evidence will take. (Such new evidence shall not be a repeat of evidence already contained in the record). Such notice shall also be served upon opposing counsel or upon the other parties if they have no counsel. The Commission may refer the taking of such additional evidence to a Referee.

The Commission may convene a first meeting of counsel to discuss the procedural aspects of the full Commission hearing.

Failure to advise the Commission within seven (7) days of an intention to present such additional evidence, shall preclude that party from offering any evidence, except for rebuttal evidence if any other party presents additional evidence.

Within (10) days after all the additional evidence is taken, or if no additional evidence is offered, within seventeen (17) days after the notice of appeal is filed with the Commission, each party shall file a brief with the Commission setting forth each party's arguments and indicating the parts of the record supporting each party's position.

Any party who desires a copy of the transcript of any hearing, may purchase said copy from the court reporting firm present at the hearing. (Amended Min. 6-2-80)

9.70 Rules of Procedure for Appeal Hearing. After all evidence has been taken and the time limits for submitting briefs has expired, the Commission shall promptly notify each party of the time of hearing, allowing each

party fifteen (15) minutes for oral argument. Though the appeal is brought on behalf of an employee, the appointing authority has the burden of proof. Therefore, the appointing authority shall begin the argument and, after the argument of the appellant, may reserve a portion of its time for rebuttal. During the argument, any member of the Commission, after recognition by the President, may ask questions of any party or their counsel.

The Commission shall announce its decision after reviewing all of the testimony, exhibits, briefs and arguments of counsel.

The decision of the Commission shall be final upon its enactment of written Findings of Fact and Conclusions of Law. The prevailing party shall, upon request, prepare proposed written Findings of Fact and Conclusions of Law, which shall be voted upon and enacted by the majority of the Commission that had voted to sustain the prevailing party's position. The decisions of the Commission are final upon adoption of its minutes by the Commission. (Amended Min. 6-2-80)